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QUARTERLY REPORT

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The **Quarterly Report** provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [<kmcdowel@doe.state.in.us>](mailto:kmcdowel@doe.state.in.us).

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DUAL-ENROLLMENT AND THE “INDIRECT BENEFIT” ANALYSIS IN INDIANA

In “Vouchers and the Establishment Clause: The ‘Indirect Benefit’ Analysis,” **Quarterly Report** January-March: 2003, the U.S. Supreme Court’s decision in Zelman v. Simmon-Harris, 536 U.S. 639, 122 S. Ct. 2460 (2002) was examined. Zelman involved a challenge to an Ohio program that provided certain “scholarships” to eligible students from the Cleveland City School District that permitted them to attend public and private schools that elected to participate in the program. Most of the private schools were parochial. A majority of the Supreme Court found the program did not violate the First Amendment’s Establishment Clause because the program was created for a secular reason (increased educational opportunities for low-income parents), the program was neutral towards religion, and State aid was not provided directly to religiously affiliated schools but arrived there through the private, independent choices of the parents themselves.

Federal analyses, however, are often difficult to apply to State-specific constitutional disputes. As noted in the **QR** article, the Embry case, a dispute involving Article I, § 6 of the Indiana Constitution, had been moving through the courts.¹ Plaintiffs objected to the State providing *pro rata* funding to public schools for so-called “dual enrolled” pupils. These students were primarily enrolled in private schools, but they were also enrolled part-time in their respective public schools to participate in courses not available in their private schools. Plaintiffs contended that “benefit” in the State constitution should be read in its absolute form, arguing the constitutional provision contains no language that would permit “indirect” benefits. The State argued otherwise, noting in addition that the *pro rata* payments were made to public schools and not private schools.²

The Marion County Circuit Court granted the State’s Motion for Summary Judgment on November 28, 2001. The Indiana Court of Appeals affirmed in Embry, et al. v. O’Bannon, et al., 770 N.E. 2d 943 (Ind. App. 2002). The Plaintiffs sought transfer to the Indiana Supreme Court.

Indiana Supreme Court Grants Transfer

On October 29, 2003, the Indiana Supreme Court granted transfer, vacating the appellate court decision, and affirming the part of the trial court’s decision finding the dual-enrollment program does not violate Indiana Constitution. Embry, et al. v. O’Bannon, et al., 798 N.E.2d 157 (Ind. 2003). The court was unanimous the dual-enrollment process did not provide any substantial benefit to parochial schools nor did the funding scheme directly finance activities of a religious nature. Accordingly, there was no violation of Art. I, § 6. However, as noted *infra*, not all the justices agreed on the possible reach of this decision.

A private school student could be included in a public school’s “average daily membership” (ADM) for state support if the private school student (1) enrolled in the public school, (2) had “legal

¹Art. I, § 6 (“Public Money for Benefit of Religious or Theological Institutions”) provides: “No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”

²The Plaintiffs were not challenging dual-enrolled students from all private schools. They were objecting to the private schools that were also parochial schools.

settlement” in the public school,³ and (3) received instructional services from the public school. 798 N.E.2d at 158-59.⁴ The Indiana Department of Education issued a series of memoranda to public school superintendents beginning in 1993 establishing the criteria for including dual-enrolled students in their respective ADM counts. *Id.* at 159.⁵ The Plaintiffs deliberately avoided asserting any federal constitutional claims, thus avoiding the application of federal case law that, at least for federal purposes, does not exclude “indirect benefit.” *Id.*

In reviewing claims under Indiana’s constitution, the Supreme Court is required to “search for a common understanding of both those who framed it and those who ratified it.” The “intent” of the framers “is paramount in determining the meaning of a provision.” This requires an examination of “the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.” This also requires a review of “the history of the times” as well as “the state of things existing when the constitution...was framed and adopted, to ascertain the old law, the mischief, and the remedy. The language of each provision must be treated with particular deference, as though every word had been hammered into place.” *Id.* at 160, citing City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001).

The language in Art. I, § 6 did not appear in Indiana’s constitution of 1816. It was included in the 1851 constitution—the current constitution—“without any substantive discussion at the convention.” *Id.* at 160-61. Some insight is provided through the comments of Robert Dale Owen, the Chair of the Committee on the Rights and Privileges of the Inhabitants of this State, provided at the conclusion of the constitutional convention:

In addition to the guarantees which find a place in the old Constitution, to secure the rights of conscience and prevent the imposition, on the citizen, of any tax to support any ministry or mode of worship against his consent, it is provided that no person shall be rendered incompetent as a witness, in consequence of his opinions in matters of religion; and that no money shall be drawn from the treasury for the benefit of any religious or theological institution. Both these provisions are found in the

³“Legal settlement” in Indiana means the principal residence of the student that dictates where the student can attend public school tuition-free. See I.C. 20-8.1-1-7.1 and I.C. 20-8.1-6.1-1.

⁴During the course of this litigation, the Indiana General Assembly amended the ADM provisions so as to provide funding on a *pro rata* basis depending upon the amount of instructional time a private school student received from the public school. I.C. 21-3-1.6-1.2.

⁵Actually, the Indiana Department of Education first addressed this subject in a legal opinion issued in July of 1985. This opinion was applied by the Indiana State Board of Education in a series of subsequent transfer tuition disputes under I.C. 20-8.1-6.1-10 that established the qualified right of a private school student to receive instruction from the private school student’s public school corporation. The initial State Board decisions predated the initial formal memorandum of the Department of Education referenced by the Supreme Court. Neither the State Board nor the Department of Education ever addressed—or encouraged—the creation of the public-private agreements under attack in Embry. All Department memoranda and State Board decisions were addressed to student-specific instances.

Constitutions of Michigan, Wisconsin, and others of recent date.

Id. at 161, citing *Journal of the Convention of the People of the State of Indiana* at 964 (reprint 1936). The language proscribing the imposition of a tax “to support any ministry or mode of worship” does not refer to “educational institutions with religious affiliations.” The intention was to prohibit public funds only for ecclesiastical functions. Id.

Although Indiana embarked on free public schools, there was no evidence that convention members were influenced by the “common school movement” launched in the 1830s in eastern states by a group that was, at its heart, anti-immigrant and anti-Catholic. Id. at 163. “[I]t appears that such biases may not have significantly motivated the Indiana education reform movement during the period before the 1850-51 constitutional convention.” Id. at 164.

The determinative issue is whether the dual enrollment process challenged by the plaintiffs confers substantial benefits upon the particular parochial schools or directly funds activities of a religious nature. Neither the text of Section 6 nor the circumstances surrounding its adoption, as outlined above, provide guidance as to whether the phrase “for the benefit of” in Section 6 was intended to erect an absolute prohibition against any expenditure of public money that might confer merely pecuniary incidental benefit to a religious institution.

Id. For guidance on the issue of “incidental benefits,” the Supreme Court looked to existing case law. There are only two previous cases broaching this constitutional provision. In *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940), the Indiana Supreme Court determined the public school system in Vincennes could lease the former parochial schools and employ properly licensed teachers who were also members of religious orders to teach in the schools. The parochial schools had closed, resulting in 800 additional students for the public school system. The public school system now had total control of the schools such that they were no longer parochial schools. The court added, “We see no valid reason why the said school trustees should not have leased the buildings and equipment furnished by the church authorities,” noting with approval cases from other jurisdictions.⁶

In the second case, a township trustee entered into agreements with mission shelters affiliated with religious groups in order to feed and provide shelter to the homeless. Some of the shelters required the homeless to attend religious services as a condition for receiving services. In the resulting class action, the Indiana Court of Appeals found that Art. I, § 6 “was not offended by the mere fact that benefits accrued to the religious missions under the agreements” but ruled for the plaintiff class because the publicly funded assistance was unconstitutionally conditioned upon attendance at religious services. *Center Township of Marion County v. Coe*, 572 N.E.2d 1350 (Ind. App. 1991). The use of religious missions as vendors of shelter services does not violate Indiana’s constitution “[a]s long as the missions provide the statutorily mandated benefit in a manner which does not infringe the Appellees’ constitutional rights....” *Coe*, 572 N.E.2d at 1360.

⁶Indiana has a current statute that permits public school districts to lease premises from religious organizations. See I.C. 21-5-12-2.

While acknowledging that dual-enrollment programs do not provide any payment of public funds directly to religious institutions, the plaintiffs urge that the dual-enrollment agreements provide specific benefits to parochial schools because they make it unnecessary for the schools to hire and pay as many teachers, and because the schools may use the resources thus saved to expand curriculum and attract students. It is not disputed, however, that the dual-enrollment programs provide obvious significant educational benefits to the Indiana children for whom participation in a dual-enrollment program affords educational resources and training in subjects they would not otherwise receive. The programs likewise benefit the State by furthering its objective to encourage education for all Indiana students. In addition, the public school systems providing instructional services under dual-enrollment plan benefit from increased public funding. Compared with the substantial educational benefits to children, the increased attainment of the State's objectives, and the additional funds made available to participating public school systems, we find any alleged "savings" to parochial schools and their resulting opportunities for curriculum expansion would be, at best, relatively minor and incidental benefits of the dual-enrollment programs.

798 N.E.2d at 166-67. "Because the dual-enrollment programs permitted in Indiana do not confer substantial benefits upon any religious or theological institution, nor directly fund activities of a religious nature, such dual-enrollment programs do not violate Section 6." *Id.* at 167.

A Concurring Opinion Dissents

Justice Theodore R. Boehm concurred "that expenditure of public funds for proper educational purposes is not 'for the benefit of' a religious institution even if the delivery point of the educational services is a parochial school." *Id.* at 169. "[P]ublic support for education of parochial pupils in subjects not offered by parochial schools seems perfectly appropriate to me." *Id.* However, he "parts company" with the implication that Art. I, § 6 may not necessarily proscribe funding to a parochial school.

"Even if we accept the meager historical evidence that animus towards Catholics was not part of the thinking of the delegates to the 1851 Indiana constitutional convention, it seems quite a stretch to conclude that a parochial school is not a 'religious institution' within the meaning of that constitutional provision." *Id.* "In sum, I agree that the legislation involved in this case is constitutional because it does not expend funds for the benefit of a religious institution. But the majority would implicitly leave the door open to public funding of sectarian schools. The Constitution stands squarely against that proposition, and for that reason I respectfully dissent from the portion of the majority opinion addressing the religious institution issue." *Id.* at 170. Justice Frank Sullivan, Jr., concurred with Justice Boehm's opinion.

There actually is no majority stance on whether Art. I, § 6 limits public funds solely to ecclesiastical functions. Justice Brent E. Dickson wrote the majority opinion, with which Justice Robert D. Tucker concurred. Chief Justice Randall T. Shepard concurred in the result but offered no separate opinion. Justice Sullivan wrote a concurring opinion regarding the standing issue (not discussed herein), which the Chief Justice joined. As noted *supra*, Justice Boehm wrote a concurring opinion

that actually dissented with that part of the majority opinion that seemed to be an overly liberal interpretation of the Indiana constitution, an opinion Justice Sullivan shared. As one commentator noted, “[A] unanimous Court agreed that, even if Section 6 did apply to private schools, there was no constitutional violation...” However, the “issue [as to whether Section 6 is restricted to ecclesiastical functions] was left to another day.”⁷

Meanwhile, Back at the U.S. Supreme Court . . .

In the **QR** article from January-March: 2003 referenced *supra*, it was noted that there were strong dissents to the Zelman decision. On May 19, 2003, the U.S. Supreme Court granted certiorari in Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), a case that involved a challenge under the Free Exercise Clause of the First Amendment rather than the Establishment Clause implicated in Zelman.

Davey involved a state-funded “Promise Scholarship” program designed to provide post-secondary assistance to students who qualify. Qualifications are based on high school grades, family income, and attendance at an accredited college in the State of Washington. The scholarship need not go to tuition costs but can go for any education-related expense, including room and board. Davey qualified for the scholarship but lost it when he chose to major in Pastoral Ministries at Northwest College. Northwest College is an accredited school but it is affiliated with a religious denomination. It teaches theology from a Bible-based Christian perspective rather than from a historical or scholarly one. Although the scholarship program is neutral towards religion, the state agency that administers the program determined that Davey’s intended use of the scholarship would violate Washington’s constitutional provision, which is more restrictive than the federal counterpart.⁸ The purpose of the program is broad: to provide some financial assistance to outstanding students who qualify for the scholarship.

The 9th Circuit concluded there was a Free Exercise violation because the State’s interest in preventing Davey’s participation was not compelling. The scholarship program is secular, and it rewards superior achievement by high school students who satisfy certain objective criteria. No funds go directly to any sectarian school or for non-secular study “unless an individual recipient were to make the personal choice to major in a subject taught from a religious perspective, and then only to the extent that the proceeds are used for tuition and are somehow allocable to the religious major.” *Id.* at 760, citing Zelman. In fact, the 9th Circuit added, “The proceeds...may be used for any education-related expense, including food and housing; application to religious instruction is remote at best.” *Id.* The court found, 2-1, that the agency’s denial of the scholarship to an otherwise qualified student based solely upon his choosing a major in theology taught from a religious perspective infringed upon his right to the free exercise of his religion.

The U.S. Supreme Court thought differently and reversed the 9th Circuit Court of Appeals. Locke,

⁷“Appellate Civil Case Law Update,” *Res Gestae*, Maggie Smith (December 2003).

⁸Art. I, § 11 of Washington’s Constitution reads in relevant part: “... No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”

et al. v. Davey, 124 S. Ct. 1307 (2004). Chief Justice William Rehnquist, writing for the majority in the 7-2 opinion, observed that the “Promise Scholarship Program” assists academically gifted students with post-secondary education expenses; however, such eligible students cannot use the scholarship at an institution where they are pursuing a degree in “devotional theology.” This exclusion does not violate the Free Exercise Clause of the First Amendment.⁹

The scholarship is funded through the State of Washington’s general fund. To be eligible, a student must meet academic, income, and enrollment requirements. A student must also graduate from a Washington public or private high school and either be in the top 15 percent of the graduating class or attain, on the first attempt, a cumulative score of 1,200 or better on the Scholastic Assessment Test (SAT) or a score of 27 or better on the American College Test (ACT). The student must enroll at least half-time in an eligible post-secondary institution in the State of Washington and may not pursue, according to statute, a “degree in theology” at that institution while receiving the scholarship. A “degree in theology” is not defined, but it was agreed this was a codification of Washington’s constitutional prohibition on providing funds to students to pursue degrees that are “devotional in nature or designed to induce religious faith.” 124 S. Ct. at 1310.

When an eligible student enrolls, it is the post-secondary institution that determines whether the student’s academic pursuit is “devotional” in nature. Northwest College is a private, religiously affiliated post-secondary school that is an eligible institution under the scholarship program. Davey planned to study to become a church pastor with the intent of serving a life-time of ministry. He decided to pursue a double major in pastoral ministries and business management/administration. It was Northwest—and not the State of Washington—that determined Davey was pursuing a degree in “devotional theology,” which would make Davey ineligible for the scholarship. Davey sought injunctive relief from the federal district court, arguing that the denial of the scholarship because of his chosen academic pursuit violated, *inter alia*, the Free Exercise and Free Speech Clauses of the First Amendment and, to a lesser degree, the Establishment Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment.¹⁰

The federal district court denied the injunctive relief and granted the State summary judgment. A divided 9th Circuit reversed, finding the State had singled out religion for unfavorable treatment, and that the State’s exclusion of theology majors was not narrowly tailored to achieve a compelling State interest.

The Supreme Court, in reversing the 9th Circuit, noted that the Establishment Clause and the Free Exercise Clause “are frequently in tension.” However, “we have long said that there is room for

⁹The First Amendment reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

¹⁰The Equal Protection Clause is located in the following: “... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law’ nor deny to any person within its jurisdiction the equal protection of the laws.”

play in the joints between them.” Id. at 1311. (internal citations and punctuation omitted). “This case involves that ‘play in the joints’...,” the court noted. Under Establishment Clause precedent, “the link between government funds and religious training is broken by the independent and private choice of recipients.” Id., citing to Zelman. “[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology,” but the actual question involved in this matter is whether the State of Washington, “pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry [citations omitted] can deny them such funding without violating the Free Exercise Clause.” Id. at 1311-12.

The court declined to find the scholarship program to be presumptive unconstitutional: (1) The program does not impose either criminal or civil sanctions on any type of religious service or rite; (2) It does not deny to ministers the right to participate in the political affairs of the community; and, (3) It does not require students to choose between their religious beliefs and the receipt of a government benefit. “The State has merely chosen not to fund a distinct category of instruction.” Id. at 1312-13.

[T]raining for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit [citations omitted]. And the subject of religion is one in which both the United States’ and the state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Id. at 1313. “[U]nder the Promise Scholarship Program’s current guidelines, students are still eligible for take devotional theology courses” and not jeopardize their scholarship so long as they are not majoring in devotional theology. Id. at 1315. “Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.” Id.

The majority did seek to limit the decision to its basic facts. “The State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses [Free Exercise and Establishment], it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.” Id.

CHILD OBESITY AND THE “COLA WARS”

Public schools are always seeking ways to raise money to support activities not otherwise supported by public funds (or not adequately funded). This has resulted in some interesting, albeit problematical, fund-raising schemes, such as the selling of advertising space or marketing specialized

bricks or tiles.¹¹ One of the more contentious schemes has been the battle between major soft drink competitors to secure exclusive marketing rights within public school districts. This has spawned the so-called “Cola Wars,” but it has also resulted in something of a backlash. The prevalence of vending machines in the public schools has been singled out as the major culprit for what is being termed as the “childhood obesity epidemic.”

The American Academy of Pediatrics (AAP), in a recent policy statement, called for the elimination of soft drinks from schools and urged doctors to contact local superintendents and school boards and “emphasize the notion that every school in every district shares a responsibility for the nutritional health of its students.”¹² In an effort to combat the increased incidence of obesity, schools should offer healthful alternatives. The AAP recognized elementary and high schools rely upon such exclusive vending machine contracts, but the organization argues that such existing contracts should include certain restrictions and discourage over-consumption by children.

According to a related Associated Press story,¹³ about 15 percent of children ages 6 to 19 are seriously overweight. This affects 9 million children, which is triple the number from a similar study in 1980. Dr. Robert D. Murray, the lead author, stated that “The purpose of the [policy] statement is to give parents and superintendents and school board members and teachers, too, an awareness of the fact that they’re playing a role in the current obesity crisis, and that they have measures at their disposal” to address it.

The AAP policy statement added that soft drinks are a common source of excess calories that can contribute to weight gain. Data show that 56 to 85 percent of school-age children consume at least one soft drink daily, mostly of the sugar variety rather than diet.

The National Soft Drink Association pooh-poohed the AAP policy as misguided. “Soft drinks can be a part of a balanced lifestyle and are a nice treat,” according to Jim Finkelstein, the association’s executive director.¹⁴ Lack of physical activity rather than increased calorie intake has contributed most to childhood obesity, he added.

In a related story, a superintendent in Lake County, Indiana, indicated his school district receives more than \$200,000 under its five-year exclusive sales agreement with a soft drink manufacturer. A superintendent of a school corporation in neighboring Porter County noted that the vending machines in his schools offer healthy choices but students typically do not choose the right snack. His school district has one of the exclusive vending contracts, which provides a “steady revenue

¹¹See “Public Schools, Bricks and Tiles, and a Wall of Separation,” **Quarterly Report** July-December: 2003 (article by James D. Boyer).

¹²*Pediatrics* (January 2004).

¹³“Group Seeks to Eliminate Sodas in Schools,” *Associated Press*, January 5, 2004 (Lindsey Tanner).

¹⁴*Id.*

stream” for the district.¹⁵ “I think schools can be supportive [of more healthy alternatives], but I don’t think it’s the primary place,” the superintendent stated. “Again, it’s a government institution taking over a family responsibility. It’s something that’s difficult to legislate.”¹⁶

Legislative Action

It may be difficult to legislate, but that has not prevented attempts at doing so. In March of 2001, the legislatures of Minnesota and Maryland attempted to ban the sales of soft drinks in the public schools. Both initiatives failed.¹⁷

In Maryland, its Senate Economic and Environmental Affairs Committee approved Senate Bill 435 that would have prohibited advertising on school buses, required school boards to review contracts with soft drink vending companies, and limit such contracts to five (5) years. “We have an obligation to protect our children from companies using them as pawns in advertising campaigns,” said the bill’s sponsor, State Senator Paul G. Pinsky.¹⁸ The bill failed.

Indiana’s General Assembly attempted to address the childhood obesity issue through legislative means in its 2004 session. House Bill No. 1014, which had bi-partisan support and bi-partisan criticism, opened up several fronts in the war. The bill contained a number of ambitious objectives:

- The Indiana Department of Education would become more actively involved in developing and promoting a curriculum designed to enhance nutrition and to increase levels of physical activity of Indiana school children;
- The Department’s Division of School and Community Nutrition Programs would develop recommendations for nutritional content of meals served in schools;¹⁹
- The Department, in conjunction with the State Department of Health, would develop model policies for the measurement of the body mass index of students or other measurement of fat composition.
- “Healthy food” and “healthy beverage” would be defined.
- Vending machines in elementary schools would not be accessible to students, while 50 percent of foods and beverages sold in middle school and high school would have to qualify as a “healthy food” or “healthy beverage” and would be restricted to areas and times so as not to interfere with the school’s regular service of meals.

¹⁵“Pop Fizz Gets An ‘F’,” Gary Post-Tribune, January 6, 2004 (Carole Carlson).

¹⁶Id.

¹⁷“Survival of the Fizziest,” *Education Week*, March 28, 2001.

¹⁸“Panel Backs Limits on Ads in School,” *The Washington Post* (March 10, 2001).

¹⁹These recommendations would be based on current nutritional science that demonstrates improvement in controlling excessive weight gain, avoiding unsafe weight loss practices, developing healthy eating habits, and avoiding diseases that are caused by unsafe dietary habits, notably diabetes and high blood pressure.

- Local school boards would have to adopt a “nutritional integrity policy” aimed at controlling excessive weight gain, avoiding unsafe weight-loss practices, developing healthy eating habits, and avoiding diseases caused by unsafe dietary habits.
- Local school boards would have to ensure that elementary school children have at least thirty (30) minutes of daily physical activity.²⁰

Lobbyists for soft drink companies opposed the bill. Although water and juice are also sold in the vending machines, the soft drink companies do not make as much money on such sales as they do for soda pop. “It’s a huge out-of-pocket expense,” Susan Fairless, a lobbyist for Pepsi-Cola told the Associated Press. “The profit is much less, not only for us but for the school.”²¹ Fairless added, “Our biggest concern with this bill is that where does the intrusion into private lives end? We feel the school system and parents are the ultimate decision makers for what kinds of choices students should have.”²²

The bill passed easily out of House committee hearings and passed the House by a 54-41 margin. The Senate, however, was not receptive. Although attempts were made to revive the bill, ultimately the bill failed to pass and died.

Some school districts have not waited for legislative action. In Philadelphia, the school district banned the sale of carbonated soft drinks in the city schools in an effort to battle obesity.²³ Beginning July of 2004, only milk, water, fruit juice, and sports drinks²⁴ will be available to its 214,000 students from most of the school district’s cafeterias and 740 vending machines. The district estimates it will lose \$500,000 a year from soft drink sales. Kathleen Dezio, president of the National Soft Drink Association, which represents most soft-drink manufacturers nationwide, said a total ban on soda pop is unnecessary. “We are concerned about obesity too ..., but we don’t believe that the restrictive approach, and bans in particular, work.”²⁵

Foods of Minimal Nutritional Value

In Texas, Agriculture Commissioner Susan Combs said she is working on a plan that would reward a school up to \$30 a pupil if the school meets certain verifiable nutritional and physical education

²⁰Indiana does not have a statute or regulation that requires recess periods for elementary schools.

²¹ “Soft Drink Companies Opposing School Vending Machine Changes,” *Associated Press*, February 11, 2004.

²²Id.

²³“Soda Sales Banned in Philadelphia Schools,” *Associated Press*, February 5, 2004.

²⁴Sports drinks have a high sugar content and will be available only in high school vending machines near athletic facilities. Soft drinks will remain available in the faculty lounges.

²⁵Id.

standards.²⁶ Combs' concerns about childhood obesity and the need for good nutrition are well known in Texas. The Texas Department of Agriculture now administers the federally funded child school nutrition program. Last summer, she issued a policy banning the sale or distribution of "foods of minimal nutritional value"—such as soft drinks, candy, and gum—during the school day at elementary schools. The ban applies to middle schools during lunch periods but does not affect high schools.²⁷

Commissioner Combs' selection of words are neither her own nor new. The United States Department of Agriculture (USDA) issued in 2001 its "School and Community Nutrition Program Policy Memorandum #01-06, *National School Lunch Program/School Breakfast Program: Foods of Minimal Nutritional Value*." The USDA's memorandum was based on a set of health goals and objectives incorporated into "Healthy People 2010," which specifically targeted obesity. It directed State and local agencies administering these programs to "increase the proportion of children and adolescents, ages 6 to 19 years, whose intake of meals and snacks at school contributes proportionally to good overall dietary quality."²⁸ According to the report, teenagers drink more soda and fruit drinks than milk, with males being particularly heavy consumers averaging more than three servings of soda and fruit drinks a day.

Schools providing USDA-funded programs must not provide access to "foods of minimal nutritional value" (FMNV) during student meal periods. Permitting access to FMNV (i.e., soft drinks) with a USDA-funded meal is prohibited. This applies to the "food service area," which includes both the serving line and the area where students eat their meals. Failure to abide by the USDA directives can result in either a disallowance of funding or recapture of funds already expended. Some schools unplug the vending machines in the "food service area" during meal times in order to ensure there is no competition between reimbursable USDA-funded meals and FMNV.²⁹

Exclusive Sales Agreements

Although the battles over signing schools to exclusive sales contracts have been fierce, there is a surprising dearth of reported cases involving such disputes.

1. In Montana Vending, Inc. v. The Coca-Cola Bottling Co. of Montana et al., 78 P.3d 499

²⁶"School Plan Ties Incentives to Nutrition," *Associated Press*, February 5, 2004.

²⁷Id.

²⁸The Division of School and Community Nutrition Programs, Indiana Department of Education, disseminated a comprehensive document based on the USDA's "Foods of Minimal Nutritional Value" guidance. The document can be viewed and downloaded at: <http://ideanet.doe.state.in.us/food/pdf/policies/pol05.pdf>.

²⁹For an additional story on the strategies employed by soft-drink companies to stem increasing criticism from anti-commercialism and child-nutrition advocates, see "Coca-Cola Plays Both Sides of School Marketing Game," *Education Week*, November 5, 2003. Also see "Faced with Criticism, Coke Changes School Strategy," *Education Daily* (March 15, 2001).

(Mont. 2003), the Great Falls Public School District entered into exclusive sales agreements with both Coke and Pepsi. The two soft-drink giants would pay the school district \$250,000 each (\$500,000 total) in annual installments of \$50,000 for the exclusive right to provide vending machines and sell soft drink products at the school district's facilities. For about twenty years prior to the Coke and Pepsi deal, Montana Vending had supplied the vending machines and soft drinks to the district. After entering into the exclusive contracts with Coke and Pepsi, the district terminated its relationship with Montana Vending.

Montana Vending sued, arguing that the school district entered into the exclusive agreements with Coke and Pepsi without abiding by Montana's public bidding process or public request for proposals. This violated the State's Unfair Trade Practices Act, Montana Vending asserted. Legal maneuvering ensued, with Montana Vending filing its action in State court while Coke and Pepsi attempted to move the matter to federal district court. The federal district court judge determined the issues being raised were ones of first impression and required analysis of Montana law. Accordingly, the federal district court judge certified the following two questions to the Montana Supreme Court:

- Are the Great Falls Public School District's actions of entering into exclusive agreements for the sale of soft drink products in its facilities legislative actions for which a school district is immune from suit?
- Is the Great Falls Public School District subject to suit under the Montana Unfair Trade Practices Act (MUTPA) as a "person" engaged as a "business," as defined in the MUTPA?

78 P.3d at 500-501. The school district argued that its school board was acting in a legislative capacity when the exclusive sales agreements were executed. Prior to the execution of the agreements, the school board had adopted two policies, one indicating the school district would seek "all available sources of revenue for financing its educational and related programs," including revenues from "nontax, local, state and federal sources." In addition, the school board indicated it would engage in a number of "revenue enhancement" activities through "approved marketing activities, including but not limited to advertising, corporate sponsorship, signage, etc...." *Id.* at 500.

The Montana Supreme Court noted the Pepsi and Coke contracts were entered into nine (9) months after the school board adopted its policies to raise revenues from nontax sources. In order to be immune from suit, the school board's actions would have to be legislative in nature and not merely administrative. Montana statute defines "legislative actions" as those which "result in the creation of law" or which "result in the adoption of school board policies." Case law, however, holds that "administrative acts undertaken in the execution of a law or public policy" are not immune from legal challenge.

The School District's agreements with Coke and Pepsi, entered pursuant to [the school board's policies], are precisely the kind of administrative actions, taken to execute policy, which are exempted from the immunizing effect of

the statute. Because the School District's agreements with Coke and Pepsi were in execution of previously adopted [school board policies], we conclude they were administrative not legislative acts. Accordingly, we hold the School District is not immune from suit for entering into the exclusive agreements for the sale of soft drink products in its facilities.

Id. at 502. As to the second certified question, the Montana UTPA does not specifically mention public school districts. The question then is whether the school district in this case was a "person" engaged in a "business." The court noted the general rule regarding the construction of "person":

A statute regulating only persons and corporations does not include the government itself, unless a contrary intention is clearly expressed. Thus, the word "person" used in a statute will not be construed so as to include the sovereign, whether the United States, or a state, or an agency thereof, or a city or town. However, the word may include the sovereign where the legislative intent to do so is manifest. Whether the word "person," as used in a statute, encompasses a state or the United States therefore depends on the context in which the word is found, including the purpose of the statute, the subject matter, and the legislative history.

Id. at 503, quoting 82 C. J. S. § 311 (1999). The term "person" typically refers to a living human being, a corporation, or other business entity. A public school district is none of these. Rather, it is, by definition, a governmental entity. For the school district to be a "person" under the MUTPA and its anti-competitive or predatory business practices proscriptions, the legislature's intent to do so would have to be manifested in the plain language of the statute. Id. at 504.

The legislative purpose for enacting the MUTPA is "to safeguard the public against the creation or perpetuation of monopolies and foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented." Id. The "plain and ordinary interpretation of this language is that the MUTPA was created to apply to *businesses*, not government." Id. at 504-05 (emphasis original). To conclude otherwise "would result in a strained interpretation of the Act and infringe upon the governmental entity's statutory powers to raise revenue for the purpose of funding education-related programs." Id. at 505. Accordingly, a public school district is not a "person" for MUTPA analysis.

Notwithstanding, Montana Vending argued the school district is engaged as a "business" through its ten-year exclusive agreement with the soft-drink companies, providing "a ready and captive market for the sale of Defendants' soft drink products." Id. The Montana Supreme Court noted, however, that only a "person" can be engaged in a "business," and the school district is not a "person" for this purpose. Id.

2. In Eastern Food Services, Inc., v. Pontifical Catholic University Services Association, Inc., and Coca Cola Puerto Rico Bottlers, Inc., 357 F.3d 1 (1st Cir. 2004), Eastern alleged the

university terminated its exclusive concession contract with it after Coca Cola made a significant donation to the school. Thereafter, Coca Cola placed its own vending machines on campus under an exclusive arrangement with the university, and Eastern had to remove its machines. Eastern sued, alleging in part the defendants violated the Sherman Antitrust Act, 15 U.S.C. § 1, by engaging in unfair business practices to eliminate Eastern as a vending machine competitor. The federal district court dismissed the antitrust claim because the purported geographic market—the university—was “extremely narrow” and not “large enough so as to constitute an economically significant area of commerce” for Sherman Act application. 357 F.3d at 3.

The U.S. 1st Circuit Court of Appeals was not any more receptive to Eastern’s anti-trust arguments. “The line is not always clear between antitrust violations and ordinary business wrongs, such as breach of contract or tortious interference... But antitrust claims are concerned not with wrongs directed against the private interest of an individual business but with conduct that stifles competition.” *Id.* at 4. The plaintiff’s description of what purportedly occurred “raises warning flags for anyone familiar with antitrust law. The university, like most landlords, controls who may set up shop on its premises. It could act as the sole on-campus supplier of food and beverages, allow multiple suppliers, or give exclusive access to one supplier.” *Id.*

In this matter, Eastern does not allege the defendants engaged in any price fixing, output restriction, or division of customers or territories. Rather, Eastern is alleging a *per se* violation of the Sherman Act through “concerted refusals to deal or group boycotts.” *Id.* However, “agreements not to deal are not *per se* unlawful. A common arrangement that involves an agreement not to deal but is far from unlawful *per se* is the exclusive dealing contract (e.g., a sole supplier contract, an exclusive territorial franchise for an outlet).” *Id.* In any event, attacks on such arrangements occur when the agreements are between competitors, which is not the situation in this dispute. *Id.* at 5. “What is alleged here is nothing other than an exclusive dealing arrangement by which one supplier—Coca-Cola—is given the sole right by the university to supply and stock vending machines on campus.” Eastern itself had previously benefitted from such an arrangement. “To show an antitrust violation in the transfer of exclusive rights from Eastern to Coca Cola, Eastern had to commit itself to show that the new arrangement would have anti-competitive effects outweighing the legitimate economic advantage that it might provide.” *Id.*

Eastern was unable to demonstrate that its competitive access to customers was harmed other than at the university. As the district court had noted, the geographic area was too small and too narrowly defined “to be a realistic geographic market,” especially as the university constitutes only a small percentage of the available distribution market for Eastern and other similar competitors. *Id.* at 6-7. “[T]oday exclusive dealing contracts are not disfavored by the antitrust laws... Rather, it is widely recognized that in many circumstances they may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.” *Id.* at 8. This dispute is not about antitrust violations but is “a contract and tort case concerned not about whether an economic market will become less competitive but about which of two companies will have exclusive access to supply vending machine food and beverages on a single campus.” The federal district

court's dismissal of Eastern's antitrust action was affirmed. *Id.* at 9.³⁰

REAL ESTATE SALES AND SCHOOL ACCOUNTABILITY LAWS

Before the federal No Child Left Behind Act of 2001 was signed into law on January 8, 2002, a number of States had already embarked upon their own school accountability endeavors in attempts to improve the overall quality of publicly funded education. Both federal and State accountability laws rely extensively upon standardized test scores as a measure of progress. Although efforts are made to caution against the use of scores for comparison purposes, such efforts have had little or no impact in stemming inevitable comparisons. These comparisons make for great newsprint, with copious charts and diagrams to demonstrate relative performance.

These comparisons are creating a "ripple effect," especially in the housing market. In a recent story, real estate agents stated that the school district where a house was located was once one of many factors potential homeowners considered, but the school district itself "is now the driving force behind an expensive housing market."³¹ Relative school performance has inspired bidding wars. "Although buyers still count commute time, a family-friendly environment and safety as criteria in home selection, they are willing to outbid others because of local schools. Home buyers are telling real estate agents that strong public schools are a ticket to a good college."³²

According to one real estate agent, more parents or married couples intending to become parents are identifying "the top-notch schools before buying a home." This wasn't a priority when the real estate agent moved to her present location in 1978. "Now everybody is checking the school scores. There's more pressure on kids to achieve." The statewide test scores have become so important to potential home buyers that the real estate agent has posted all the school-by-school scores on her web site.³³

Negligent Misrepresentation or Educational Malpractice?

Although most States do not recognize "educational malpractice" as a viable tort theory for recovery

³⁰The court expressed its exasperation with Eastern's claim at one point during the written opinion: "The time of judges and lawyers is a scarce resource; the sooner a hopeless claim is sent on its way, the more time is available for plausible cases."

³¹"Educated Buyers: Test Scores, School Ratings Drive Decisions As Much As Floor Plans and City Services," *San Francisco Chronicle*, February 15, 2004 (Marsha Ginsburg).

³²*Id.*

³³*Id.*

of damages,³⁴ this has not prevented lawsuits that are based on a variation of this theme.³⁵

The most recent case of this type occurred in Florida and involved allegations of negligent misrepresentation that resulted in a family purchasing a home in a particular public school district only to learn the educational program was ill-suited to their children's scholastic needs.

In Simon, et al. v. The Celebration Company, et al., 2003 Fla. App. LEXIS 18397 (Fla. App. 2003), the parents sued various entities, including several universities, alleging they suffered damages when they were induced to relocate to the Town of Celebration in order to enroll their children in The Celebration School, a public school that represented it provided "a quality education based upon a time-tested and successful curriculum known as 'best practices.'" Although the trial court dismissed the complaint, the appellate court reinstated many of the parents' claims and remanded for trial.

In their original complaint, the parents alleged false representations were made to them concerning the quality of the public education available at The Celebration School. Based on these false representations, the parents bought a house and relocated the family to the Town of Celebration. The children regressed academically and socially, according to the parents.

The Florida Court of Appeals noted the parents had stated sufficient allegations regarding fraudulent inducement and negligent misrepresentation. A "viable cause of action for fraudulent inducement" requires allegations that the defendant:

- made a false statement regarding a material fact;
- knew that the statement was false when he made it or made the statement knowing he was without knowledge of its truth or falsity;
- intended for the plaintiff to rely and act on the false statement; and
- the plaintiff justifiably relied on the false statement to his detriment.

The elements for stating a cause of action under "negligent misrepresentation" require that:

- The defendant made a misrepresentation of material fact that he believed to be true but which was in fact false;
- The defendant was negligent in making the statement because he should have known the representation was false;

³⁴See, e.g., "Educational Malpractice: Emerging Theories of Liability," **Quarterly Report** April-June: 2001. Also see "Educational Malpractice," **Quarterly Report** April - June: 2003.

³⁵In Sain v. Cedar Rapids Community School District, 626 N.W.2d 115 (Iowa 2001), analyzed in the **QR** April-June: 2001 referenced *supra*, the Iowa Supreme Court found a high school guidance counselor was liable for incorrect advice provided to a student who subsequently failed to qualify for a college basketball scholarship. The court construed Sain's claims as based on negligent misrepresentation, which is actionable, as opposed to challenges to classroom methodology, theories of education, or expected academic achievement. In a factually similar case, however, the Wisconsin Supreme Court declined the rationale in Sain, finding a guidance counselor and school district were not liable for inaccurate information provided to a prospective student-athlete. See Scott v. Savers Property and Casualty Insurance Co., 663 N.W.2d 715 (Wisc. 2003).

- The defendant intended to induce the plaintiff to rely on the misrepresentation; and
- Injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation.

Id. at 13-14.

The trial court dismissed both counts, ruling the claims were essentially claims of “educational malpractice, a cause of action not recognized by the Florida courts.” Id. at 14.

We reverse this ruling because the [Parents’] complaint properly sets forth sufficient facts to defeat a motion for dismissal since the complaint sufficiently alleged all of the elements of the two causes of action [fraudulent inducement and negligent misrepresentation]: (1) the defendants made a misrepresentation of material fact to [the parents] regarding the curriculum offered at The Celebration School; (2) the defendants either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false; (3) the defendants intended to induce [the parents] to buy a home in the Town of Celebration based upon the misrepresentations concerning the curriculum offered at The Celebration School; and (4) injury resulted to the [parents] acting in justifiable reliance upon the misrepresentation.

Id. at 14-15. The appellate court also rejected the trial court’s characterization of the parents’ suit as “disguised claims of educational malpractice” because the fraudulent inducement and negligent misrepresentation claims are not directed towards the public school’s failure to provide a proper education. Rather, the parents are seeking recovery of damages allegedly incurred as a result of relocating to the Town of Celebration based on actionable misrepresentation. Id. at 15.

The Florida Court of Appeals also rejected the alternative argument that the misrepresentations were mere “puffing.”³⁶ “As a general rule, “an action for fraud or misrepresentation cannot be predicated on statements of opinion or promises of future action but, instead, must be based on a statement concerning a past or existing fact [citations omitted]. However, where a statement can be viewed as coming from someone who possesses superior knowledge of the subject of the statement, such statement may constitute a statement of fact, rather than opinion, and thus subject to suit [citation omitted].” Id. at 16.

In this case, the parents sufficiently alleged the defendants worked in concert to misrepresent the fact that a well researched curriculum known as “best practices” was presented to students attending The Celebration School. The defendants, the parents alleged, “utilized their various positions as reputable educators as a means of indicating to prospective purchasers of property in the Town of Celebration that they possessed superior knowledge about the viability and success of the ‘best practices’ curriculum.” Id. at 17. Since the statements were made by “persons who appeared to the general public as possessing superior knowledge on the subject of school curriculum,” the

³⁶“Puffing” or “puffery” refers to exaggerated praise, especially in publicity or advertising. Under such circumstances, a reasonably prudent person would know the representations are exaggerated or outrageous to the extent that no reasonable person could justifiably rely upon them.

statements could be considered “statements of fact, not opinion.” *Id.*

In a dissenting opinion, Judge Vincent G. Torpy, Jr., did not think the plaintiffs sufficiently stated their allegations, nor did he believe the parents justifiably relied upon representations from the defendants. He noted The Celebration School “was a new school without any track record” and that the mother had “20 years of experience as a school teacher” such that the plaintiffs could not have reasonably relied upon any misrepresentations. “Simply put, it is not reasonable to believe that a particular curriculum by a new public school guarantees that the school will be successful in teaching one’s child. There are too many variables in the education process for this to be the case.” *Id.* at 19-20.

Judge Torpy agreed with the trial court that “this complaint is simply an attempt to assert an unauthorized claim for educational malpractice by disguising it as a claim for fraud.” *Id.* at 20-21.

Could It Happen in Indiana?

Although Indiana has joined the majority of States in not recognizing “educational malpractice” claims,³⁷ this does not preclude more creative approaches, such as “disguising” a claim under a different tort theory. Under Indiana law, a seller in a typical residential real estate transaction is required to notify the prospective buyer of defects within the actual knowledge of the seller. See I.C. 32-21-5 *et seq.* “Defect” is defined in part as “a condition that would have a significant adverse effect on the value of the property...” While a reasonable interpretation of the statutory provisions would indicate that such a “defect” would be one that is subject to “repair, removal, or replacement” affecting the physical structure and attendant utility services, the statute does not actually restrict a “defect” to such concrete examples. A location in a school district that is considered to be a poorly performing school district could arguably be a “condition that would have a significant adverse effect on the value of the property.” I.C. 32-21-5-4.

This is not so far-fetched, especially since Indiana law considers a haunted house to have a defect. This may be a bit unfair to describe the statute as referring to a “haunted house,” but there is little difference between a haunted house and a “psychologically affected property,” the actual term used in statute. Under I.C. 32-21-6 *et seq.*, an owner or agent is not liable for refusing to disclose that a dwelling or real estate is a “psychological affected property” or for refusing to divulge details that created such a condition (such as someone who lived in the house but died of HIV, anyone who died in the house, a felony was committed in the house, criminal gang activity occurred there, a firearm was discharged while a law enforcement officer was engaged in his official duties, or the house was the site of the illegal manufacture or distribution of a controlled substance).³⁸ However, an owner or agent “may not intentionally misrepresent a fact concerning a psychologically affected property in response to a direct inquiry” from a party interested in buying, renting, or leasing the property.

³⁷See *Timms v. M.S.D. of Wabash Co.*, EHLR 554:361 (S.D. Ind. 1982), and *Bishop v. Ind. Technical Vocational College*, 742 F.Supp. 524 (N.D. Ind. 1990).

³⁸See I.C. 32-21-6-3 for definition of “psychologically affected property.”

There are no reported cases in Indiana regarding “psychologically affected properties.”³⁹

If a “psychologically affected property” could be a “defect,” why would a less attenuated and more objective assessment of defect based on school performance not be a “defect”? These are the questions that will haunt the courts in the next few years.

COURT JESTERS: THE MISSING LINK

Litigation, *n.* A machine which you go into as a pig and come out of as a sausage.

Ambrose Bierce, *The Devil's Dictionary*⁴⁰

For Robert Amicone, his legal troubles all began with a sausage but ended not with a pig but with his goose cooked, all for the princely sum of \$2.02.

Amicone, for reasons not made clear by the court, had a history of disaffection with his local Denny's Restaurant. Despite this, he continued to order meals there. On October 6, 1988, he and a companion ordered breakfast at Denny's. They became dissatisfied with the sausage portion of the breakfast. The waitress offered to reheat or replace the offending sausage, but Amicone refused these offers, insisting that the cost of the sausage be deducted from the bill. He then argued with the assistant manager over the amount of the bill. The assistant manager stated the bill was \$6.02, sans sausage, but Amicone insisted the bill should be \$3.91. He offered the waitress \$4.00 in payment, but she refused it. He left the four dollars on the table and left.⁴¹

Not to be deterred, Denny's notified the local constabulary, who dispatched an officer to investigate the matter. The officer asked Amicone to pay the \$2.02, but Amicone refused. He was charged with “theft of services.” He was later cleared of this charge, but decided his litigation days were just

³⁹But there is in New York. See *Stambousky v. Ackley*, 572 N.Y.S.2d 672 (A.D. 1 Dep't. 1991) where the New York Appeals Court found that a house was “haunted” as a matter of law, the seller knew it was haunted, but the buyer did not receive the premises in the vacant condition contemplated. Accordingly, the buyer was permitted to rescind the contract and retrieve his down payment. See “Court Jesters: The Spirit of the Law,” **Quarterly Report** July-September: 1997.

⁴⁰Bierce (1842- 1913?), a contemporary of Mark Twain and Bret Harte, was an American author and journalist, noted for his acerbic wit. *The Devil's Dictionary* is actually a collection of 998 definitions that appeared in a series of newspaper columns. Bierce's short stories based on his Civil War experiences continue to be as riveting today as when they were first published. In 1913, at the age of 71, he set off for Mexico where a revolution was underway. He disappeared without a trace.

⁴¹There is no mention of a gratuity. It seems unlikely the waitress received any tip, other than to avoid Amicone's table in the future.

beginning. He sued Denny's for "malicious prosecution."

Amicone's case was thrown out at the trial court level. He sought better service at the appellate level, but this proved to be a disappointment as well. In Amicone v. Shoaf, Affinito, and Denny's, Inc., 620 A.2d 1222 (Pa. Super. 1993), the court was decidedly unhappy having to waste its time and resources over moldy sausage and a lousy \$2.02. Pennsylvania Superior Court Senior Judge William Franklin Cercone, writing for the three-judge panel, noted succinctly:

This case belongs in the "believe it or not" category. In better hands, the literature that could be inspired by the facts of this case would qualify this matter for admission into the "cause celebre" status. Unfortunately, not being ready for such an exertion, we shall proceed to "link" the facts and law in a more mundane fashion.

620 A.2d at 1223. The court then set about to discuss the matter in "a more mundane fashion," as threatened. In addition to finding that Amicone failed to present sufficient evidence that Denny's engaged in malicious conduct, he also waived any objections to the admission of evidence of his prior bad conduct at the restaurant. He also waived any objections to Denny's successful motion that prevented his introduction of "evidence of gratuitous food and beverages provided by [Denny's] to local police officers prior to trial."⁴² Id. at 1225.

The court decided that a typical dispatch of this case under its "more mundane fashion" rubric was insufficient. Given the paucity of legal argument and lack of practical significance, Judge Cercone penned the following ditty as an indication of the court's indignation at Amicone's vendetta:

Sausage and eggs!
Sausage and eggs!
\$2.02 he refused to pay
So now in court it's for us to say.
Sausage and eggs!
It wasn't the price
The parties contend
It's the principle, they pretend.
Sausage and eggs! \$2.02 involved
A sum so easily resolved
But no give or take here
They insist on a legal atmosphere.
Oh, in Uncle Sam's land
Any person in court may protest
But, dear Lord, the Judge says,
From this test, please give me a rest.

Id. at 1223. Judge Cercone concluded his decision with: "Preserve us from more of this!"

⁴²There is no evidence as to what was the nature of the "gratuitous food and beverages provided...to local police officers," but it is presumed this included coffee and donuts.

It should be noted that although Amicone invested a considerable amount of time and money in defending himself on the “theft of services” charge and then bringing his unsuccessful “malicious prosecution” action, he never did pay Denny’s that \$2.02. All of which illustrates the Chinese Proverb: “Going to law is losing a cow for the sake of a cat.” Or, in this case, a sausage.

QUOTABLE . . .

Men have been getting drunk ever since Noah celebrated the subsidence of the flood. The ancient Germans, from whom the Anglo Saxon race sprung, used to propose their laws in their Legislature while drunk and consider their passage while sober. And it is suspected by some that their descendants propose laws in Legislatures of the present day while in the same condition, though their enactment may not be considered while sober, as by their ancestors.

Associate Justice H. H. Neill in Texarkana & Fort Smith Railway Co. v. Frugia, et al., 95 S.W. 563, 565 (Tex. App. 1903).

UPDATES

Pledge of Allegiance

The U.S. Ninth Circuit Court of Appeals’ decision in Newdow v. Congress et al., 328 F.3d 466 (9th Cir. 2002) is well known. The majority of the 9th Circuit agreed with Newdow that the 1954 inclusion of “under God” in the Pledge of Allegiance violated the First Amendment’s Establishment Clause when applied to public schools.⁴³ On October 14, 2003, the U.S. Supreme Court, sans Justice Antonin Scalia,⁴⁴ granted certiorari but limited the review to the following two questions:

1. Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance; and
2. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words “under God,” violated the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

⁴³Consult the Cumulative Index for past issues of the **Quarterly Report** addressing the Pledge of Allegiance both pre-Newdow and post-Newdow.

⁴⁴Justice Scalia has recused himself from any participation in this matter because he had publicly stated his views on the matter before it had been presented to the Supreme Court.

124 S. Ct. 384 (2003). Supreme Court arguments were held on March 24, 2004. A decision is expected during the summer of 2004. But Newdow isn't the only case involving the Pledge. In an unusual argument in United States v. Wonschik, 353 F.3d 1192 (10th Cir. 2004), a defendant attempted to have his conviction reversed for possessing a machine gun due, in part, to the judge's reciting the Pledge of Allegiance during jury selection. On the morning jury selection was to begin, the trial court addressed a panel of 47 jurors. He spoke about the events of September 11, 2001, and the obligations now facing American citizens. In essence, the judge gave the jury panel a sort of "pep talk," adding:

I didn't do it before September 11, the Pledge of Allegiance, in the morning we begin a trial. It isn't that I didn't put stock in it. Of course, I did. But I just didn't think it needed to intrude on the business of the Court every time we pick a jury trial. I was wrong. Each of us, me included, on an occasion of this importance, needs to remind ourselves of our obligation to our country.

Would you join me now in the Pledge of Allegiance.

The potential jurors then joined the judge in the recitation of the Pledge as codified at 4 U.S.C. § 4. Wonschik did not object to the recitation of the Pledge. 353 F.3d at 1195. The 10th Circuit was not impressed with Wonschik's novel argument that the recitation of the Pledge denied him a fair trial.

Although Mr. Wonschik's trial counsel did not object to the jurors' recitation of the Pledge of Allegiance, he now contends on appeal that the district judge violated the Constitution. Mr. Wonschik argues that the district judge's action was unconstitutional under West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943), in which the Supreme Court held that a state board of education could not compel its students to recite the Pledge of Allegiance.⁴⁵ However, the question whether recitation of the pledge in this context violates Barnette is irrelevant, because Mr. Wonschik does not claim that *he* was compelled or invited to recite the pledge, and he does not have third-party standing to raise claims on behalf of the potential jurors. [Citation omitted; emphasis original.]

Mr. Wonschik's more serious argument is that jurors' recitation of the pledge, in a case where the United States is a party, violates the other party's right to a fair trial because the jury is in effect pledging its allegiance to one party in the case. Mr. Wonschik contends that the jury was particularly likely to draw this inference in his case because immediately following recitation of the pledge, the district judge addressed the prosecutor and asked whether "the United States of America" was ready to proceed. [Transcript citation omitted.]

We recognize that trial judges, among their many other responsibilities, should take

⁴⁵This was the Pledge version prior to the 1954 amendment that inserted "under God."

care not to create the impression that it is appropriate for the judge or the jury to favor the prosecution simply because the court and the prosecution are both institutions of the United States. However, we do not think it reasonable to suppose that the jurors inferred from the Pledge of Allegiance a patriotic obligation to serve as a rubber stamp for the prosecution. Rather, we believe the pledge represents, and evoked in the jurors' minds, a more enlightened patriotism, fidelity to which required them to uphold our nation's Constitution and laws by sitting as impartial finders of fact in the matter before them. That is as likely to benefit a defendant as to prejudice him.

353 F.3d at 1198-99. Wonschik's conviction was affirmed.

Attorney Fees and the IDEA: Demise of the "Catalyst Theory"

1. In **Quarterly Report** July-September: 2003, the decision in T.D. v. LaGrange School District No. 102, 349 F.3d 469 (7th Cir. 2003) was reported. In T.D., the 7th Circuit joined the 2nd, 3rd, and 4th Circuits in applying the U.S. Supreme Court's decision in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services, et al., 532 U.S. 598, 121 S. Ct. 1835 (2001), to attorney fee requests under the Individuals with Disabilities Education Act (IDEA). See 20 U.S.C. § 1415(i)(3). Buckhannon did not involve the fee-shifting provisions of the IDEA, but it did involve similar federal laws that have virtually identical fee-shifting provisions, notably the Americans with Disabilities Act of 1990.⁴⁶

In Buckhannon, the Supreme Court adopted a standard definition for "prevailing party" as "a party in whose favor a judgment is rendered regardless of the amount of damages awarded." 121 S. Ct. at 1840. In order to be a "prevailing party," the Court added, one would have to have either a judgment on the merits or a settlement agreement that is enforceable through a consent decree, or some other court-ordered change in the legal relationship between the parties. Id. The "catalyst theory" permitted the plaintiff to recover attorney fees so long as the complaint had sufficient merit to withstand a motion to dismiss.

A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorneys fees without a corresponding alteration in the legal relationship of the parties.

Id. (emphasis original). The Supreme Court added that private settlements "do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the

⁴⁶The only notable difference is that IDEA provides for attorney fees for a "prevailing parent" rather than a "prevailing party."

agreement are incorporated into the order of dismissal.” *Id.* at n. 7.

The 7th Circuit had an opportunity to expand upon its *T.D.* decision in a decision released on February 13, 2004. *Sonii, et al. v. General Electric Co.*, 359 F.3d 448 (7th Cir. 2004), involved an employment-discrimination dispute that was believed to have been settled privately in October of 2000, with the plaintiffs then seeking to have their case dismissed. Under the law as it was then understood (i.e., applying the “catalyst theory”), the plaintiffs would have been considered “prevailing parties” for attorney-fee purposes. However, *Buckhannon* altered that understanding seven months later, finding that private settlements are insufficient for determining “prevailing party” status unless the settlement “yields a consent decree or some equivalent from of judicial *imprimatur*.” *Sonii*, 359 F.3d at 449. There would have to be “mandatory language entered as a judgment, or the judge’s signature in lieu of the litigants,’ [to] suffice to confer prevailing-party status, but ... a private settlement followed by dismissal of the lawsuit does not.” *Id.* Although the settlement occurred in October of 2000 and the plaintiffs agreed to have their dispute dismissed with prejudice, dismissal never occurred. An appeal to the 7th Circuit without a final disposition at the federal district court level is premature, the court wrote. Notwithstanding, the 7th Circuit expanded upon the potential avenues for the litigants and the district court.

The judge “could have implemented the parties’ agreement in at least three ways: (1) a one-line order of dismissal; (2) a dismissal reserving jurisdiction to enforce the underlying contract; (3) a dismissal incorporating the settlement contract as a judgment of the court.” *Id.* There are different consequences depending upon which avenue the district court judge selected. “[T]he first would not make the plaintiffs prevailing parties; the third would do so; and the second would be ambiguous, for neither *Buckhannon* nor *T.D.* definitely resolves the consequences of an order that suffices to preserve federal jurisdiction to enforce the pact [citation omitted], but still treats it as a private contract rather than a judgment.” *Id.* at 449-50.

Which option the district court chooses could depend in part on whether the judge deems it appropriate to enter a form of judgment that vindicated pre-*Buckhannon* expectations—if the parties had any, a question itself best answered by the district judge rather than an appellate court. That the judge denied plaintiffs’ request for fees suggests that she had in mind option (1) rather than option (3), but a mental assumption falls short of a final decision. Plaintiffs have briefed the appeal on the assumption that the judge’s inaction equates to option (2), but all this shows is that loose ends need to be tied up before anything happens in this court.

Id. at 450. The appeal was dismissed for want of jurisdiction. The district court was ordered to “proceed with dispatch to (1) enter a final judgment dismissing the suit with prejudice in conformity with the settlement; (2) determine whether that judgment makes plaintiffs prevailing parties under the standards of *Buckhannon* and *T.D.*; and (3) make a definitive award of legal fees....” *Id.*

2. The U.S. 1st Circuit Court of Appeals has now joined the 2nd, 3rd, 4th, and 7th circuits in applying Buckhannon to IDEA attorney fee requests. In Doe v. Boston Public Schools, 358 F.3d 20 (1st Cir. 2004), the student sought placement in a therapeutic day school. The school district disagreed with this placement and offered instead a placement in one of its schools. The parties attempted to mediate the dispute but were not successful. The student asked for a hearing. Just before the hearing was to begin, the school offered the student a placement in a private therapeutic day-school program. The student accepted the placement offer and asked to have the placement read into the record and signed by the hearing officer. The hearing officer declined to do so. The student then moved to have the placement offer declared a “final judgment” with the hearing officer directing the school to implement the student’s IEP. The hearing officer again declined to do so. 358 F.3d at 22.

The student then filed an action for attorney fees in the federal district court. The district court granted the school district’s motion to dismiss, relying upon Buckhannon’s definition of “prevailing party” to find the student did not receive a “final judgment on the merits” or obtain “a court-ordered decree.” Id.

The 1st Circuit affirmed the district court’s dismissal, noting that “*Buckhannon*’s prohibition on catalyst theory-based fee-shifting applies expansively.” Id. at 24. “[W]e hold that *Buckhannon* is presumed to apply generally to all fee-shifting statutes that use ‘prevailing party’ terminology, including the IDEA.” Id. at 25. The statutory text, structure, and legislative history of the IDEA do not rebut this judicial presumption that Congress did not intend to permit prevailing parties to recover attorney fees where a desired result was achieved through settlement. Id. at 26-29.

Date: _____

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